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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1951

No. 696

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner,

vs.

SARAH O'DONNELL, Administratrix of the Estate of
WILLIAM O'DONNELL, Deceased,
Respondent.

REPLY BRIEF FOR PETITIONER.

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Reply to Respondent's Point I.

Respondent urges that "[o]n the questions of instructions alone, which was decided adversely to the defendant by both the trial court and the Court of Appeals * * * this Court would not be justified in granting certiorari." The answer to this contention is found in the decision of this Court on the former appeal, for this Court granted certiorari and reversed the judgments of both the trial court

and the Court of Appeals *solely* upon the ground that the jury was not properly instructed as to the legal import of the breaking of a coupler. *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384. We submit that determination of the proper measure of damages in a suit under the Federal Employers' Liability Act is of just as grave public importance as the determination of the proper standard of liability; indeed, as we pointed out in the petition for certiorari, the issue is one of much wider application. The issue upon which this Court granted the writ in the former appeal can arise only in that small class of cases in which a coupler separates or breaks without "some purposeful act of control." But the issue of the proper measure of damages for a wrongful death presents itself in *every* case of the death of a railroad employee while engaged in interstate commerce; upon the trial of every such action where minor children survive the decedent the question of how the jury shall be instructed as to the damages recoverable on behalf of the minor children necessarily presents itself. The conflict between the rule laid down in the Sixth and Eighth Circuits and the decision below upon this precise and far-reaching issue raises a conflict so frequently occurring as to require final determination by a decision of this Court.

Reply to Respondent's Point II.

Respondent does not defend the correctness of the instruction given by the trial court on the measure of damage and, thus conceding the error, urges only that "[u]nless the alleged erroneous charge induced the jury to render an excessive verdict, no error can be predicated on it." But just as the Court of Appeals tested the "reasonableness" of the verdict by a standard which the jury

was expressly forbidden to use in arriving at the amount of their verdict, so counsel for respondent test the "excessiveness" of the verdict by a standard equally forbidden to the jury, namely, by multiplying the years of expectancy by the decedent's average gross annual earnings. Recoverable damages are measured not by the decedent's average earnings (*Kansas City etc. Ry. Co.* v. *Lesie,* 238 U. S. 599, 604) but only by the pecuniary benefits which his beneficiaries might have expected from him during his lifetime (*Michigan Central R. R. Co.* v. *Vreeland,* 227 U. S. 59, 70; *American R. R. of Puerto Rico* v. *Didricksen,* 227 U.S. 145, 149) not multiplied by his years of expectancy (*Avance* v. *Thompson,* 387 Ill. 7) but reduced to their present cash value (*Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U. S. 485). As the Court of Appeals below recently held in *Wetherbee* v. *Elgin, J. & E. Ry. Co.,* C. A. 7, 191 F. 2d 302, in holding inadmissible in evidence the actuary's calculations of the cash value at the time of trial of decedent's probable future gross earnings:

> "* * * His testimony of his calculations was merely to assist the jury on the matter of computing, and he could not properly be permitted to use as the basis for his calculations, figures or elements which the jury could not use. The only figure the jury was authorized to use to reduce to its present cash value was the pecuniary benefits which the beneficiaries might reasonably have received from decedent. * * *"

The argument of plaintiff's counsel to the jury did not cure the deficiency in the court's instructions; on the contrary, his argument only intensified the error.[1] We

1. In his opening argument to the jury counsel for the plaintiff said:

> "His Honor will tell you in his instructions what elements and items of damages you may and should properly

submit, however that the gravamen of the error below is not whether the verdict is reasonable "when compared with verdicts in similar cases" or excessive when measured against decedent's probable aggregate future gross earnings; the test to be applied and the standard by which the jury should have been instructed was the present cash value of what the decedent might reasonably have been expected to give his widow during her lifetime and his children during their minority. The defendant has been deprived to have this issue of fact decided by a jury.

Reply to Respondent's Point III.

We respectfully submit that nothing in respondent's argument minimizes in the slightest the square-cut conflict between the decision below and the decision of the Court of Appeals for the Sixth Circuit in *Thompson* v. *Camp*, C. A. 6, 163 F. 2d 396.

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consider, and **if you multiply his earnings by his reasonable expectancy of life,** and he might have lived to be much older, and beyond his expectancy, and he might have increased his wages and he might, through energy and ambition, attain a higher position in life where he would double his income which would all go to the benefit of his family." (R. 217)

In his closing argument, after referring to average gross earnings of $3500.00 a year, plaintiff's counsel continued:

"I say to you, Ladies and Gentlemen, that **if you multiply that,** and under a safe investment at 3 per cent, that you should give us everything we sued for. We sued for **$100,000.00** in this case, and if under the theory of the present value of money invested at 3 per cent, it would only give her $3,000.00 a year, a safety security investment. **If you multiply that by his expectancy of 25 or 30 years** it would make a sum around that amount for the lifetime of this man." (R. 219) (Emphasis supplied.)

Conclusion.

We respectfully submit that the conflict between the decisions relied upon by petitioner and by respondent in the several courts of appeal upon so grave an issue as the proper measure of damages in an action for wrongful death under the Federal Employers' Liability Act presents proper issues which this Court should review by certiorari.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.